

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Western Division

THE PROCTER & GAMBLE COMPANY,)
Plaintiff,) Civil Action No. C-1-02-393
v.) Hon. Walter Herbert Rice (Chief Judge)
THE COCA-COLA COMPANY,) Hon. Sharon L. Ovington (Magistrate)
Defendant.)
)

**THE COCA-COLA COMPANY'S MOTION FOR CLARIFICATION OF STATUS OF
P&G'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

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Dated: August 10, 2004

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INTRODUCTION

The Coca-Cola Company (“Coca-Cola”), through counsel, respectfully moves for clarification of the status of The Procter & Gamble Company’s (“P&G”) Motion for Leave to File a Second Amended Complaint, in response to the Notation Order entered on July 15, 2004.

Until the entry of the July 15, 2004 Notation Order, the parties proceeded on a record where P&G’s Motion for Leave to File Second Amended Complaint had not been granted or acted upon. The July 15 Order indicates that the Court has

“previously sustained (on 9/5/03)[36] Motion for Leave to File Second Amended Complaint, and finding as moot [51] Motion for leave to file Sur-Reply in Opp: Second Amended Complaint was allowed on 9/5/03.”

Coca-Cola, however, respectfully submits that the September 5, 2003 Order was issued inadvertently, and formally rendered moot by the September 9, 2003 Order granting Coca-Cola leave to file its Opposition Brief. In support thereof, Coca-Cola respectfully informs the Court of the following facts:

PROCEDURAL POSTURE

1. On August 12, 2003, P&G filed a Motion for Leave to File Second Amended Complaint. (Docket No. 36.) The cut-off date for amending the Original Complaint was December 16, 2002. The Second Amended Complaint would have added claims 12-18 to the case, which had not been asserted previously, and would have forced a broad disclaimer of attorney-client information to defend against a generally pled allegation of willful infringement.

2. On September 4, 2003, Coca-Cola filed an Unopposed Motion for Enlargement of Time to file its Opposition Brief. (Docket No. 41.)

3. On September 5, 2003, the Court issued a Notation Order granting P&G’s Motion for Leave to File Second Amended Complaint. The next day, however, the Court’s clerk

informed counsel for Coca-Cola that the September 5, 2003 Order was inadvertently issued and was immediately withdrawn.

4. On September 9, 2003, the Court entered an Order granting Coca-Cola's Unopposed Motion for Enlargement of Time to file its Opposition Brief. (Docket No. 43.)

5. In accordance with the September 9, 2003 Order, Coca-Cola filed its Opposition Brief on September 18, 2003 (Docket No. 45), and P&G filed its Reply Memorandum on September 29, 2003. (Docket No. 48.)

6. On September 23, 2003, the parties completed fact discovery.

7. On October 8, 2003, Coca-Cola filed a Motion for Leave to File Sur-Reply Brief to Respond to a New Issue of Unsettled Law Raised in Plaintiff's Memorandum. (Docket No. 51.) The brief notified the Court that the Federal Circuit issued an Order for *en banc* rehearing regarding the limits of attorney-client privilege waiver in willful infringement.

8. On October 15, 2003, P&G filed its Opposition to Coca-Cola's Motion for Leave to File Sur-Reply Brief. (Docket No. 52.)

9. On April 7, 2004, the parties conducted *Markman* proceedings before this Court. These proceedings concerned the proper claim construction of only claims 1-11 of the '847 patent. Claims 12-18 were neither briefed, nor argued, nor at issue during the *Markman* proceedings.

10. There was no application to amend the Scheduling Order to either permit discovery on the additional patent claims 12-18, or to brief and argue their claim construction in additional *Markman* proceedings.

In light of the Clerk's correction to the then newly initiated electronic docket, it does not appear that the September 5, 2003 entry constituted a substantive review and Order on the merits. The parties have, in fact, proceeded accordingly. To the extent the September 5, 2003 entry was ever deemed an appropriate entry, Coca-Cola respectfully submits that it was vacated by the Court's September 9, 2003 Order. (Docket No. 43.) Coca-Cola therefore continued in trial preparation under the allegations set forth in P&G's First Amended Complaint.¹

CONCLUSION

For the reasons stated, Coca-Cola respectfully requests that this Honorable Court clarify the status of P&G's Motion for Leave to File Second Amended Complaint. On this record, the July 15, 2004 Order should be vacated to reflect the current procedural posture of this case.²

¹ If anything, at this juncture, Coca-Cola's concerns over the lack of good grounds and lateness of P&G's application for a second, substantive amendment to the complaint, as already amended, are even more acute now that P&G has only recently requested the additional discovery required by the new allegations. Even though fact discovery closed long ago, on August 6, 2004, P&G requested additional fact and expert discovery regarding the new "concentrate" products based on the newly asserted claims 12-18 of the '847 patent, as well as P&G's new allegations of willful infringement of the '847 patent. *See Ex. A, Ferrera Letter dated Aug. 6, 2004.*

² In the interest of completely clarifying the procedural record, the Court may consider adding an entry which vacates the September 5, 2003 Order as well.

Dated: August 10, 2004

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of The Coca-Cola Company's Motion For Clarification Of Status Of P&G'S Motion For Leave To File Second Amended Complaint was served on this 10th day of August 2004, via Facsimile and Federal Express to Plaintiff's counsel:

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